



## International Comparative Jurisprudence



### SEVERAL CHARACTERISTICS OF MEDIATION IN CRIMINAL FIELD IN THE REPUBLIC OF KOSOVO<sup>1</sup>

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**Abstract.** Mediation is a type of alternative procedure that enables the resolution of a criminal case outside of court proceedings. This procedure has been regulated by a special law, and is applicable to various fields of law. The locus of this scientific paper shall exclusively be mediation in the criminal field. The Criminal Procedure Code of Kosovo, in addition to standard criminal proceedings, has outlined the “Alternative Procedures” of criminal case resolution including: Mediation; Provisional Suspension of Procedure; Conditions when criminal prosecution is not mandatory; Plea Agreement; Acquittal from Punishment; The announcement of defendant as “Cooperative Witness” as well as Diversion. Mediation as an alternative procedure in the criminal field is distinguished by several characteristics which make this procedure very efficient in comparison to standard criminal procedure. These include: the resolution of a criminal case without going to court; the possibility of improving a perpetrator’s behavior by applying non-criminal measures; reconciliation and peace-building between the parties; the economization of expenditures and time; and many other benefits. The modest results of this scientific paper indicate that mediation has several advantages which make it an efficient criminal case resolution mechanism. It is therefore encouraged to increase the level of its application in the criminal field, as it represents the most productive mechanism for resolving light criminal cases.

**Key words:** Mediation, mediator, characteristic, criminal proceedings, state prosecutor, Kosovo.

#### Introduction

A criminal case which is the main object of criminal proceedings may, in contemporary trends of criminal procedure, be resolved by different methods. The most natural and common manner of criminal case resolution is through conducting a regular criminal procedure which culminates in a court decision, through which the criminal case is resolved. Based on recent social developments, ideas for the alternative resolution of a criminal case, along with criminal proceedings, were developed. Such progressive ideas for the resolution of a criminal case by alternative procedures have arisen as a result of efforts to increase the efficiency of the criminal justice system, thereby reducing the number of unhandled criminal cases in courts, shortening time for delivering justice, and reducing costs.

The purpose of this research is to present the characteristics of mediation in the criminal field in Kosovo by observing, in terms of its implementation, the state prosecution and basic courts at the national level, highlighting its effectiveness.

The research methodology used is based on the statistical method, where the official data on the implementation of mediation in the criminal field in Kosovo during the years 2013-2018 were analyzed. In using the individual case study method for the purpose of this study, 300 criminal cases resolved by mediation were analyzed. The

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comparative method was also applicable, where resolutions provided by countries that have established good practices in the implementation of mediation in the criminal field were analyzed. Literature from various local and international authors was also consulted, as well as commentary and basic legislation regulating mediation in Kosovo.

## **2. The main characteristics of mediation in the criminal field in Kosovo**

Mediation in the criminal field in Kosovo is distinguished by several features which make it distinct from other areas of law, and which shall be handled in the following section of this research.

### **2.1. Mediation derives from customary law**

When discussing mediation in Kosovo, it is important to distinguish between traditional and institutional aspects. *Traditional mediation* is known to Albanians because our people's tradition has been closely related to mediation. The Albanian people developed the customary law, which is applied mainly for regulation of civil-legal relations, and partly for criminal-legal relations, when conflicts occurred, revenge, and blood-feud (Krasniqi & Hajdari, 2012, p. 130). Traditional influence based on tribal order has come as a result of mistrust in the state organs of foreign rulers, which has influenced different disputes not being referred to the courts, but instead referred to solution via elders. Therefore the Albanian people, through their long history of occupation, have chosen mediation through elders to resolve various disputes instead of following court proceedings. Dispute resolution through elders was based on the institution of faith (the word given), in such a way that rules which were applicable for faith have been adequately implemented for mediation (Ismaili, 2005, p. 15). Traditional mediation rules for Albanians have been summarized in customary law inherited over the centuries, respectively in Canons: instruments in which the rules of mediation are summarized, such as the Canon of Lekë Dukagjini<sup>3</sup> and other canons of different provinces.

On the other hand, *institutional mediation* in Kosovo represents a relatively new institution in our own law, as it was regulated by law relatively late. The Law No. 03/L-057 on Mediation<sup>4</sup> (hereinafter LoM), was been adopted in 2008, marking the inauguration of the mediation institute in Kosovo. Mediation under this law was foreseen as an instrument for the resolution of: criminal cases, civil law disputes, administrative law disputes, labor law disputes, employment relationships disputes, commercial law disputes, and family law disputes, provided this does not fall under the exclusive competence of a court or any other competent body. Bearing in mind the social interest that mediation has, the state has transformed it by making it a part of the legal system and an effective means of resolving various disputes, including disputes in the criminal field.

The application of mediation in the criminal field in Kosovo has been outlined in Art. 228 of the Provisional Criminal Procedure Code (2003),<sup>5</sup> and is currently indicated by Art. 232 of Code No. 04/ L-123 of the Criminal Procedure (hereinafter: CPC, 2012).<sup>6</sup> Mediation aims to help parties, (the perpetrator of a criminal offence and the injured party/victim) through extra-judicial procedure and with the help of a certified mediator, to achieve reconciliation, as well as to compensate for damage in cases when the criminal offence results in damage being caused (Krasniqi, 2018, p. 199; Latifi et al., 2012, pp. 187-188). The goal of mediation is to avoid criminal proceedings by the parties by choosing mediation as an alternative procedure, and to provide reconciliation and

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<sup>3</sup> The Mediation Institute is foreseen and regulated in 16 articles, (nodes) 667-682. by the Kanun of Lek Dukagjini. See more: At Shtjefën Gjeçovi, Kanun of Lekë Dukagjini, Pristina, 2001, pp. 68-69.

<sup>4</sup> Mediation as an alternative dispute resolution procedure in Kosovo, including the criminal field, is foreseen by Law No. 03/L-057 on Mediation, which was approved on 18 Septemeber 2008 (Official Gazette of the Republic of Kosovo, No. 41, dated 1 November 2008). Retrieved on 1 October 2018, from <https://gzk.rks-gov.net/ActDetail.aspx?ActID=2592>

<sup>5</sup> The Provisional Criminal Procedure Code of Kosovo has been approved by Regulation No. 2003/26, dated 6 July 2003, issued by the Special Representative of the Secretary-General. This Code has been in force until 31 December 2012.

<sup>6</sup> Code no. 04/L-123 of the Criminal Procedure was adopted on 13 December 2012 and entered into force 1 January 2013.

compensation for damage caused by criminal offence, which are important aspects of “Restorative Justice” (Latifi et al., 2012, pp. 187-188).

## **2.2. Restricting the scope of mediation in criminal matters**

The main characteristic of mediation in the criminal field in Kosovo lies in the limitation of its scope. Scope determines the boundaries of implementing mediation. Accordingly, mediation is applicable only for light criminal offences that might warrant a punishment by fine or imprisonment of up to three years (Art. 2 of Law no. 06/L-009 on Mediation). This approach is considered to be reasonable because it is not possible to imagine the application of mediation for serious criminal offences. Criminal offences for which mediation is permitted represent the lower degree of social risk, and are extremely frequent in practice (Krasniqi & Hajdari, 2012, p.133).

As a basic criterion for the implementation of mediation, the gravity of a criminal offence as well as the type and height of a criminal sanction shall be taken into consideration, with respect to the potential punishment for the criminal offence (Krasniqi, 2018, pp. 201-202).

Based on these criteria the Criminal Code foresees around 200 forms of criminal offence that can be resolved by mediation.<sup>7</sup> The first criterion has been considered as an obstacle to the work of prosecutions and courts because they could not refer a significant number of criminal offences to mediation procedure – those for which the punishment was potentially cumulative (punishment by both imprisonment and fine). This legal obstacle has already been eliminated by the adoption of Law no. 06/L-009 on Mediation, by which the scope of applying mediation in the criminal field in Kosovo has been expanded. Art. 2 (par. 2) of this law provides that: “Mediation in the criminal field shall be applicable in cases where is foreseen a punishment by fine and punishment by imprisonment up to three (3) years”.

## **2.3. Discretionary referral of criminal case to mediation**

The referral of a criminal case to mediation is foreseen as a possibility and not an obligation for the prosecution and court. The state prosecutor as an authorized plaintiff, upon receipt of a criminal report, has to make a detailed assessment of a case by finding whether that case is suitable for mediation. This can be done by evaluating, but is not limited to, the following circumstances: the nature and type of a criminal offence, the circumstances in which criminal offence has been committed, the personality of the perpetrator, the consequences caused, his/her criminal record, the degree of criminal liability, and the behaviors of the perpetrator before and after committing a criminal offence.

The state prosecutor or a judge, as authorized subjects in criminal proceedings, are not obliged to refer a criminal case to mediation. Referral of a criminal case to mediation is a possibility which depends on numerous factors that make it a concrete, suitable case for mediation procedure. Regular criminal proceedings, according to the principles of legality, are always conducted when there is reasonable doubt that a criminal offence has been committed, and is prosecuted *ex officio*. Mediation, however, is an alternative procedure which may be applicable when it comes to the fulfillment of the legal requirements of cases, according to the principle of discretion and by the will of the parties. The discretionary character of referring a criminal case to mediation procedure results from the content of Art. 232 (par. 1) of the CPC itself, which provides that: “The state prosecutor may refer the criminal charge for mediation for a criminal offence punishable by fine or imprisonment up to three (3) years.”

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<sup>7</sup> These forms of criminal offences, in most cases, are light forms of basic criminal offences. For example, Criminal offence: Theft from Article 325 may be referred to mediation but only for paragraph 2 and not for paragraph 1.

The law also recognizes the right of the parties to propose mediation in the criminal field. This form of referral is also known as self-referral (self-initiation), which is provided in Art. 8 (par. 6) by the LoM. In the criminal field, self-referral by the parties must be subject to the assessment and consent of the state prosecutor or single trial judge. When the parties propose mediation, their will must be assessed by the state prosecutor or the single trial judge. Unlike other fields of law where the principle of availability applies, which provides the parties with the possibility to self-initiate disputes in the criminal field, the willingness of the parties to mediate must be articulated through the prosecution or court.

The state prosecutor, according to Art. 232 (par.1) of the CPC, must make an assessment of circumstances related to the specific case, including the personality of the perpetrator and the nature of the criminal offence, in order to make sure that a case is reasonable and suitable for referral to mediation procedure.

This assessment of the circumstances of a case is an indispensable and very significant condition which must be met in every concrete case. The importance of assessing the suitability of a case in order to refer it to mediation procedure is indicated through an elaboration of the following practical case: “We have received criminal charges against the suspect N.N. because of the criminal offence: Light bodily injury, foreseen under Art. 188 (par. 1) of the Criminal Code. The perpetrator/suspect is a husband while his wife is the injured party. The perpetrator has been previously convicted for the same criminal offence committed against his wife.” In this case, despite the fact that the formal legal requirements to refer the case to mediation are fulfilled, respectively this criminal offence is punishable by imprisonment of up to one year. However, if the perpetrator's personality and his past are properly assessed, such a case is neither appropriate nor reasonable to refer to mediation procedure. This practical case indicates clearly that the perpetrator of a criminal case's behavior has not improved, even though he has been previously convicted, so granting a second possibility to him by referring the case to mediation is unreasonable. Another reason for not referring this case to mediation procedure is the fact that we are dealing with domestic violence criminal offences, which are excluded from mediation.

#### **2.4. Evaluating the suitability of a case for referral to mediation**

One of the characteristics of mediation in the criminal field is the applicability of this institution for a certain category of criminal offences. Criminal offences which may be referred to mediation procedure are not expressly outlined by legal regulation. Our lawmaker has, however, stipulated the type and weight of criminal sanction as a qualifying criterion for the referral of a criminal case to mediation. In any case, when this primary condition is met an evaluation must be performed on the circumstances surrounding the perpetrator (his/her personality, past, criminal liability, and behavior after commission of a criminal offence) and the criminal offence (intent or negligence, whether the perpetrator commits a criminal offence for the first time or is a recidivist), as well as the other circumstances which may be important in assessing each concrete case.

Assessing the suitability of a concrete case for referral to mediation is an indispensable condition that should be performed by the state prosecutor or judge, depending on at which stage of proceedings the criminal case is. From a practical point of view several criminal offences, although legally eligible for mediation (the height of punishment) may nevertheless be inappropriate for referring to mediation. The criminal offences which do not have traditional injured parties but, via their completion cause harm to public interest, cannot be referred to mediation procedure. As an argument for this matter, it should be emphasized that the participation of the injured party is indispensable to mediation procedure. Such criminal offences include: Unauthorized possession of narcotics (Art. 275); Forbidden trade, (Art. 305); Forbidden production, (Art. 306); Tax evasion, (Ar. 313); Smuggling of goods, (Art. 317); Avoidance of Customs Fees, (Art. 318); Pollution, degradation or destruction of environment, (Art. 347); Illegal hunting, (Art. 359); Driving in an unable state or drunk (Art. 379); and Failure to Report or False Report Property, (Art. 437) of the Criminal Code. These are just a few criminal offences, which, by nature of their content, are not suitable for referral to mediation procedure.

## **2.5. Prohibition of referral to mediation procedure of domestic violence criminal offences**

Criminal offences which fall under the scope of domestic violence cannot be referred to mediation procedure, as stipulated by the Criminal Procedure Code draft, which enters into force on January 1, 2020. This solution shall apply to prosecutors as well as to judges (Art. 231 (par. 1) of the Criminal Procedure Code draft).

The referral of domestic violence cases to mediation has also been forbidden for state prosecutors according to the Instruction on Non-Reference of Domestic Violence Cases, issued by the Chief State Prosecutor as a binding document on all prosecutors (Chief State Prosecutor, Instruction A.nr. 360/16 on Non-Referral of Domestic Violence Cases, 2016, p. 1). This instruction foresees the prohibition of state prosecutors referring criminal cases to mediation procedure that relate to criminal offences committed within families, and thus constitute “Domestic Violence.” According to this act, the practice of referring cases of domestic violence to mediation procedure conflicts with domestic and international law regulating the field of mediation.

Due to many factors, in domestic violence cases persons are in an unequal position. Thus the victim, respectively the injured person, is in a diminished position relative to the perpetrator, regardless of whether they are a spouse, child, parent, brother, or sister. As a result of this situation, it is not possible to guarantee the free expression of will by the injured party, which is a fundamental principle of mediation.

In Art. 10 (par. 1) of the Law no. 03/L-057 on Mediation, it is explicitly dictated: “The parties to proceedings are free to decide on the conduct of mediation procedure.” Art. 10 (par. 3) provides that “mediation commences after signing of the parties' agreement for initiation of mediation,” and in Art. 12 (par. 1) it is stipulated that “the agreement reached to mediation procedure depends solely on will of the parties.” By analyzing the LoM provisions, it can be concluded that equality of the parties in the expression of their wills constitutes a principle, and therefore is a requirement for initiating and conducting, but also for reaching the agreement to, mediation procedure. From these provisions it is clear that the parties involved in domestic violence, respectively the perpetrator in the capacity of aggressor who exercised violence and power of domination and the victim of crime subjected to this violence, do not have an equal position, and therefore cannot freely express their desire to enter into agreements based on mutual and equal will.

The nature of these provisions, in referring to the will of the parties, aims toward the existence of equal status of the parties, and therefore cases of domestic violence - due to the fact that they violate this basic rule of mediation – are neither suitable nor reasonable for referral to mediation.

Similarly to domestic law, international acts also foresee a limitation in referring domestic violence cases to mediation. Art. 48 (par. 1) of the Council of Europe Convention on the Prevention of Violence against Women and Domestic Violence provides that “the parties shall take the necessary legislative or other measures to halt the mandatory alternative dispute resolution processes, by including mediation and reconciliation, with respect to all types of violence covered by this convention.” (Council of Europe Convention CETS No. 210 on Preventing and Combating Violence against Women and Domestic Violence, 2011). The Istanbul Convention prohibits only compulsory mediation in cases of domestic violence thus allowing mediation at the will of the parties, but due to legal prohibition this possibility is also excluded in Kosovo.

Because of the abovementioned reasons the referral of domestic violence cases to mediation procedure is forbidden. Another reason for this prohibition may be the increasing number of domestic violence cases, including serious murders of some women by their husbands, which have shocked our society.<sup>8</sup> Considering

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<sup>8</sup> Such cases include the murders of women by their spouses, including the late Diana Kastrati killed on 18 May 2011; Zejnepe Bytyçi Berisha killed on 23 October 2015; and Valbona Ndrecaj killed on 7 August 2018. For more information, see the TV documentary “Unstopped Murders”. Retrieved on 22 November 2018, from YouTube: [https://www.youtube.com/watch?time\\_continue=204&v=Xk5Z2BanJsM](https://www.youtube.com/watch?time_continue=204&v=Xk5Z2BanJsM)

these cases, the state prosecutor has determined that domestic violence cases have priority in their handling, by effectively prosecuting all perpetrators and providing support, satisfaction, and security to the injured parties.

Foreign authors are divided concerning the matter of mediation in domestic violence cases, hence several authors think that mediation may be applicable even in domestic violence cases (Bryant, et al. 2010, p. 54; Davis, 2007, pp. 279-281; Zylstra, 2001, p. 261) by excluding cases where children are victims of violence (Sitarz, 2018, p. 356). Some authors exclude this possibility by noting that domestic violence victims can easily be re-victimized after mediation, and therefore domestic violence as a phenomenon should be prosecuted by the state institutions (Garrity, 1998, p. 2).

## **2.6. Definition of a legal deadline for conducting the mediation procedure**

Another important characteristic of mediation in the criminal field is foreseeing by law the legal deadline for conducting mediation procedure. Mediation procedure should commence, be conducted, and finish within the time limit set by law. By the provision of Art. 232 (par. 4) of the CPC and Art. 16 (par. 1) of the LoM, it is permitted that mediation procedure lasts up to ninety days. This deadline is estimated to be sufficient to carry out the necessary procedural actions until agreement is reached between the parties. The deadline begins to run from the day the parties sign the agreement to initiate the mediation procedure until the agreement is reached. Determining the legal deadline for conducting mediation procedure aims to increase the efficiency of this procedure.

In practice, mediation has been indicated to be an effective means of criminal case resolution, where out of 300 criminal cases studied parties reached agreement within a single hearing session in 280 cases. In 13 cases this was achieved within two hearing sessions, and in only 7 cases the parties had to attend three hearing sessions in order to reach the agreement.

The increasing enforcement of mediation in the criminal field remains a general interest issue. One of the methods of achieving this goal is to organize different campaigns and other forms of raising awareness, which are necessary for informing society about mediation and its advantages. This is necessary because, as evidenced by the various surveys conducted with respondents, most citizens have no knowledge of mediation (Zeri, 2015, p. 2). Recognition of mediation is a prerequisite for its application in practice, because parties can only propose mediation as an alternative to criminal case resolution if they know about it in advance.

## **2.7. Indispensable participation of parties and mediator to mediation procedure**

The presence of the parties to mediation procedure at each stage, from the beginning to the end, is an indispensable requirement. Duly, in mediation procedure, the perpetrator and the injured party must be present at each stage of the procedure. Art. 11 (par. 4) of the LoM stipulates that: "To mediation procedure, the natural person must be personally present," while Art. 12 (par. 7) states that "in addition to the parties, their representatives and the mediator, to mediation procedure may participate also the third party, upon the prior consent of the parties to proceedings." This provision makes clear the fact that the parties must personally participate in mediation procedure. The provision in question stipulates that the parties and mediator are indispensable participants, whereas the third parties have the possibility to participate in mediation procedure if the parties agree to this in advance, by guaranteeing the confidentiality of procedure.

The participation of the parties to mediation procedure being indispensable is understandable due to the fact that the criminal case is a subject of personal concern to the parties themselves, and that any procedural actions must be undertaken personally by the parties. Of course, the parties may be represented by their authorized representatives, but the authorized representative cannot undertake any procedural action on behalf and account of any party without the party's own presence.

Even the mediator's participation in mediation procedure is an indispensable condition. The indispensable participation of mediator in mediation procedure can also be derived from Art. 3 (par. 1, subpar. 1.4) of the LoM, which provides the following definition of mediator: "The mediator is the third person, the impartial one, licensed by The Ministry of Justice, which has been selected to mediate between the parties in order to resolve disputes, in accordance with the principles of mediation." This provision defines the position of mediator to mediation procedure, which has the duty of exercising the mediator's function - to mediate between the parties, a role that can only be fulfilled by the mediator's participation in procedure. It is clear and understandable that mediation between the parties, communicating with them, organizing joint and separate sessions, providing settlement options, and even reaching the agreement itself can only be done by the participation of the mediator, who is a key person in mediation procedure. The practical and logical concept of mediation procedure implies participation of the third person in the role of mediator between the parties.

In contemporary trends the so-called "Online Mediation" (Online Dispute Resolution) is increasingly being implemented as one of the most widespread forms of mediation in contemporary society. Online mediation has an effect in terms of increasing procedural efficiency, reducing costs, and saving time.

Online mediation is applied particularly in cases where the parties are geographically distant from one another. Online mediation is convenient because it offers the opportunity, even when the parties are in different and distant places, for this issue not to present an obstacle when it comes to conducting mediation procedure. Despite the great advantages of this type of mediation, the possibility of its application in the criminal field is limited because, according to the LoM, the personal participation of the parties in the proceedings is mandatory, and only exceptionally may they authorize their procedural representatives by mutual consent.

Art. 11 (par. 4) of the LoM states that "the neutral person must be personally present, through technology or representation with the consent of the parties." Based on this, it would appear valid to conclude that online mediation is also recognized by our law.

In those countries where this type of mediation is applied, contact with the party located abroad is made by the mediator mainly via video link. Online mediation hearing sessions are conducted via video conferencing or audio conferencing, and can include traditional electronic forms such as email, fax, teleprinter, and telephone network. The process of document exchange is also carried out through digital cameras and scanners. In this process it is necessary to ascertain the documents and prove their authenticity (Hörnle, 2003, p. 6).

Despite the advantages of advanced technology, however, there is a serious risk that unauthorized persons (hackers, etc.) may interfere with the process by hacking, disrupting communications, damaging data, or any other form of intervention (Gjaka, 2011, p. 64). Online mediation has been practiced in North America since 1996, and is widely practiced in Australia (Tyler, 2015, p. 3). As for Kosovo, however, due to a lack of experience and the logistical conditions, this type of mediation is currently unworkable.

## **2.8. The lack of strict procedural rules**

Mediation procedure in the criminal field is not based on strict rules provided by law. In fact, based on the provisions of the CPC and the LoM, there are no clear formal rules of mediation procedure. Bearing in mind the lack of rules stipulated by law the parties have the authority to establish the rules of procedure by themselves. Unlike court proceedings, for which there are strict formal rules, mediation procedure does not have such constraints: "The parties, together with the mediator, decide on the rules of procedure and the level of formality" (Osmani, 2008, p. 8).

However, mediation theory and practice have adopted rules on the basis of which mediation procedure is derived. Based on this fact, the parties may agree about rules of the procedure which they shall establish by written agreement. The parties have the right to decide the number of hearings to attend, depending on the need

and complexity of the case. The parties have the right, by agreement, to avoid any stage of the mediation procedure when they consider that it is not necessary for their case: "The rules of mediation procedure may be approved by agreement of the parties" (Mazadoorian, 2002, p. 507).

If the parties to the agreement did not set out the rules of procedure then the mediator, in accordance with the rules in force, shall determine the manner in which the mediation will take place. In this regard: "Mediation is an informal and secret process in which the neutral party (mediator) helps the parties to understand their interests" (Superior Court of California, 2007, p. 2). In the absence of strict procedural rules, the fundamental principles of mediation guaranteed by the LoM should be applied, which are the following: the expression of the free will of the parties; equality, objectivity, independence, secrecy and mutual trust. In order to guarantee the legality and credibility of the mediation process, the determination of the rules of procedure by the parties in coordination with the mediator must be in accordance with the spirit of the mediation principles.

## **2.9. The superficial level of criminal case resolution by mediation**

Despite of the fact that through mediation a criminal case can be completely resolved, in the practice of implementing this institution in the criminal field in Kosovo its surface level becomes apparent. Out of 300 criminal cases studied and completed through mediation from Kosovo prosecutions and courts during the period of 2013-2018, in only 56 (fifty-six) of them (Criminal Cases of the Basic Prosecution Office in Prizren (2018): PP/II.nr.368-10-2018; PP/II.nr.2604-10-2018; PP/II.nr.359-10-2018; PP/II.nr.367-10-2018, PP/II.nr.343-10-2018; PP/II.nr.1673-10-2018) have the parties agreed that, in addition to apology and mutual consent, the respondent (suspect/defendant) will also compensate for the damage caused by criminal offence. Perhaps the reason for parties not including compensation for damage in mediation procedure is related to many issues. These might include: the waiver of the injured party from this right; the lack of accurate information by the mediator about this right; the defendant's unwillingness to compensate for the damage, due to lack of funds or disagreement with the accuracy of the assessed damage in the absence of expertise; or a plethora of other similar reasons. However, despite this fact the injured party, especially when it comes to criminal offences against property or in any case where by commission of a criminal offence any legal rights have been damaged, has the right to seek compensation for the damage. Compensation of damage is an important aspect of mediation procedure. In cases where it is applicable the criminal case is resolved fully and in merit, and the injured party does not have to submit any lawsuit for compensation of damage, thereby achieving full efficiency.

## **2.10. Lack of mechanisms guaranteeing the implementation of agreement**

The Kosovar lawmaker did not foresee any mechanism that guarantees the implementation of an agreement reached at mediation procedure. Neither the provisions of Art. 232 of the CCP nor those of the LoM have put forward a mechanism guaranteeing the application of an agreement. This situation stems from the fact that mediation is based on the principle of free will of the parties, which extends to the implementation of an agreement. Neither the state prosecutor nor the court have the legal authorization to take responsibility for the implementation of an agreement, thus this issue remains at the will of the parties which, within an agreement, may also stipulate the manner of its execution. Regarding this issue, the mediator has an obligation to notify them when it comes to giving their consent to enter into mediation. Concerning the implementation of an agreement, it is worth mentioning that the Albanian lawmaker has put forward a more advanced solution where, by Art. 23 (par. 3) of Law No. 10/385 on Mediation in Dispute Resolution, is foreseen that the execution of an agreement reached at mediation procedure is carried out by the "bailiff service."

Implementation of the mediation agreement must be voluntary, but in cases where the parties fail to comply with their agreed obligations the law provides for possibilities of enforcement. Art. 15 (par. 2) of the LoM stipulates



that the mediation agreement approved by the state prosecutor has the force of a final decision, whereas paragraph 1 stipulates that the agreement accepted by the single trial judge has the power of an execution document under the law on enforcement procedure (Art. 2 (par. 2) of Law no. 04/L-149 on the Execution of Criminal Sanctions, 2013).

In cases where the defendant refuses to execute the subject matter of a mediation agreement, the injured party must seek its right in enforcement proceedings through a reasoned execution proposal. Concerning the execution of an agreement reached at mediation procedure, Art. 15 (par. 1) of the LoM provides that “in cases where the criminal case has been referred by the court, the agreement reached in writing shall be sent to the court, which, after approval, shall have the power of execution document under the relevant law on enforcement proceedings. If the defendant fails to comply with the obligation set forth in the agreement, the injured party has the right to seek execution in the enforcement proceedings.” Art. 22 (par. 1, subpar. 1.4) of the Law on Enforcement Procedure provides that the agreement of a mediation procedure, when accepted by the court, constitutes an executive title which may be subject to enforcement. In this case, the injured party, in order to exercise their right to execute the object of the agreement reached at the mediation procedure, must address the reasoned proposal to the competent court. According to Art. 15 (par. 2) of the LoM, “in cases where the case is referred by the prosecution, the agreement reached in writing is sent to the prosecution, which, after approval by the chief prosecutor of the respective prosecution, has the force of a final decision,” and therefore is executable.

### 3. Official data on the implementation of mediation in the criminal field in Kosovo during the period of time 2013-2018

Based on official data concerning the implementation of mediation in the criminal field in Kosovo during the study period of 2013-2018, it becomes clear that, year on year, the implementation of mediation has increased. Increasing the application of mediation and alternative procedures, while avoiding standard criminal proceedings, should be regarded as a positive step towards humanizing the criminal procedure. It also serves to increase efficiency, lead to the speedy administration of justice, and reduce the number of criminal cases in prosecutions and courts.

**Table 1.** The application of mediation procedure by Kosovo basic prosecutions during the period of 2013-2018  
 (Source: Kosovo Prosecutorial Council Statistics Office).

<b>The number of criminal cases conducted by mediation</b>						
Basic Prosecution	2013	2014	2015	2016	2017	2018
Prizren	2	4	4	0	229	390
Pejë	12	10	61	7	24	189
Gjilan	10	18	14	39	35	44
Pristina	58	82	144	235	124	115
Ferizaj	67	82	104	98	150	87
Gjakova	43	36	78	93	84	11
Mitrovica	17	66	155	57	72	495
<b>In total:</b>	209	298	560	1129	718	1331

Based on the data provided for the study period of 2013-2018 (Table 1), it is evident that the Basic Prosecutions have implemented mediation in a significant manner. As a characteristic of these data it transpires that the number of implementations of mediation is increasing from one year to the next.

In 2013 at the country level, mediation was implemented in relatively low numbers by basic prosecution offices. The most likely reasons for this situation may be related to: the lack of practice in terms of implementing mediation, the large number of cases, the limited number of prosecutors, the lack of knowledge of the parties in seeking mediation as an alternative to adjudication, or other similar reasons.<sup>9</sup>

In 2014, there was a marked a trend in increasing the implementation of mediation from the previous year. The reason why there is a small number of cases conducted through mediation in Prizren has to do with the fact that the Mediation Center did not function in this city at this time (Interview with Chief Prosecutor of Basic Prosecution in Prizren. A.Sh, dated 10 May 2018).

In 2015, there is an increase in the number of cases conducted through mediation compared to previous years. In 2016, a total of 1129 mediation criminal cases have been resolved, of which there were no cases in Prizren because at that time in this prosecution office there were only 4 prosecutors in charge of a large number of criminal cases (Interview with Chief Prosecutor of Basic Prosecution in Prizren, A.Sh. dated 10 May 2018).

In 2017, a decreasing trend of criminal cases conducted by mediation compared with previous years is evident. The reasons for these statistics relate to the lack of mediation offices in the main centers of the country after the end of financial support from external donors.

2018 marked the highest number of criminal cases conducted through mediation. A total of 1331 criminal cases were been resolved through mediation in this year. The reasons for increasing the number of cases resolved through mediation stem from the new prosecutors' recruitment,<sup>10</sup> but also the election of new chief prosecutors of basic prosecutions, which have intensified the importance of implementing alternative procedures. The biggest progress in the implementation of mediation was made by the Basic Prosecution in Prizren, where by applying this procedure during the period of time from 2017-2018, 619 criminal cases have been resolved. A reason for this increasing number may also be the raising of awareness of the parties to alternative proceedings, and to mediation as an alternative to adjudication.

**Table 2.** The application of mediation procedure by basic courts in Kosovo during the period of time 2013-2018  
 (Source: Kosovo Judicial Council Statistics Office).

<b>The number of criminal cases conducted by mediation</b>						
Basic Court	2013	2014	2015	2016	2017	2018
Prizren	15	8	94	1	5	40
Pejë	12	18	98	29	10	32
Gjilan	88	122	203	194	137	120
Pristina	108	112	164	306	146	142
Ferizaj	10	13	18	21	48	35
Gjakovë	6	14	28	56	12	50
Mitrovicë	3	9	36	39	29	32
<b>In total:</b>	242	326	641	646	387	451

Based on the data provided for the study period of 2013-2018 (Table 2), it is clear that the basic courts have applied the mediation procedure at a low level compared to the number of cases at work.<sup>11</sup> As a feature of these

<sup>9</sup> These conclusions are based on interviews with prosecutors and judges of general departments. The interviews involved one prosecutor and one judge from each prosecution office and basic court.

<sup>10</sup> In 2017, 25 new prosecutors were recruited, and in 2018 21 prosecutors. Retrieved on 1 October 2018, from [http://www.kpk-rks.org/single\\_lajmi/1176/member-25-prosecutor](http://www.kpk-rks.org/single_lajmi/1176/member-25-prosecutor) and [http://www.kpk-rks.org/single\\_lajmi/1674/member-21-private-t-rinj-n-system-prosecutorial](http://www.kpk-rks.org/single_lajmi/1674/member-21-private-t-rinj-n-system-prosecutorial) and <https://kallxo.com/bet-21-processor-te-rinj/>

<sup>11</sup> According to the Kosovo Judicial Council data in 2018, the number of pending cases in Kosovo's basic courts was around 200,000. As for the number of pending cases in the general departments there is no exact number. The number of criminal

data, it transpires that from year to year there is an increase in the number of implementations of mediation as an alternative procedure to regular trial.

In 2013, at the national level, mediation by the basic courts was implemented in extremely low numbers. This number can be attributed to the fact that in some cities Mediation Centers did not functioned at all, and the Basic Courts were charged with a large number of criminal cases. The number of judges was also extremely low, thereby making it impossible to focus on the application of alternative procedures.

In 2014, through mediation a total of 326 criminal cases were resolved by the basic courts in Kosovo, marking an increasing trend of mediation implementation from the previous year. Compared to 2013 there was a slight increase in the number of cases completed through mediation procedure, although this number is estimated to be low compared to the number of cases that were unresolved in this period of time.

In 2015, in comparison to the previous year, there is also an increase in the number of cases completed by mediation procedure. In regards to the previous year there was a doubling of the number of criminal cases completed by mediation procedure.

2016 also represented a significant increase in the number of cases completed by mediation procedure compared to the previous year.

In 2017, compared to the previous year there was a downward trend in the number of cases resolved through mediation. This decrease in the number of cases completed is justified by the fact that of 423 cases referred to mediation, only 387 were resolved. The parties of these cases reached agreement, while in 36 cases mediation was unsuccessful for various reasons.<sup>12</sup>

In 2018, there was an increasing trend in the number of cases resolved through mediation. Perhaps the reasons for this positive trend are related to the recruitment of new judges who are more familiar with alternative procedures, in addition to an increase in the awareness of parties in seeking mediation as an alternative to adjudication, and other similar reasons.

Regardless of the number of cases resolved through mediation which, as abovementioned, may not be considered to be at the desired level, state prosecutors and judges should be encouraged to apply alternative procedures to a greater extent, including mediation. The implementation of alternative procedures for state prosecutions is the target of the 2018 work plan, which stipulates that in any case where legal conditions are fulfilled, prosecutors are encouraged to apply alternative procedures instead of regular criminal proceedings (State Prosecution Office, 2018, pp. 10-11).

Although there is no centralized accurate data on the percentage of successful and failed cases of mediation, it is believed that the mediation success rate is around 85%, while that of failure constitutes around 15% of the cases referred.<sup>13</sup> The higher success rate of mediation than that of failure is understandable, since in practice the state prosecutor and the single trial judge make contact with the parties before referring the case to mediation, from which they ascertain their suitability and readiness for mediation.

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cases is now significantly lower, following an increase in the number of judges in the last two years. Retrieved on 8 October 2018, from <https://gazetablic.com/judiciary-ngadalshem-perballe-hundredths-mijera-lendeve-te-selected/>

<sup>12</sup> Mediation Commission data concerning the number of cases mediated by the basic courts in Kosovo during the period of time 2015-2017.

<sup>13</sup> Currently, the Prosecutorial Council, the Judicial Council, and the Mediation Commission do not possess centralized accessible data regarding the success and failure rate of criminal mediation cases.

#### 4. Some distinctive characteristics of mediation in Kosovo with several other countries

From analysis conducted of legislations of several countries concerning mediation in the criminal field (Table 3), it is clear that there are various characteristics of this institution. This stems from the fact that each state foresees different solutions, and therefore adapts the legislation to suit its needs, so differences in this regard are normal.

**Table 3.** Several distinctive characteristics of mediation in Kosovo compared with some other countries.

	Criterion of application	Restrictions in implementation	Duration of procedure	Execution of agreement
Kosovo	Criminal offences punishable by fine or imprisonment up to three (3) years	Criminal offences of domestic violence	90 days	It does not have a special mechanism for execution of agreement.
Albania	Criminal offences that are prosecuted at the request of the victim or upon the complaint of the injured party. The punishment ranges from 6 months to 5 years (Art. 2 of Law No. 10/385 on Mediation in Dispute Resolution).		Legal deadline is not foreseen (According to Art. 14 (par. 1) of Law No. 10/385 on Mediation in Dispute Resolution), the court of the case stipulates an optimal term for conducting mediation procedure, which lasts depending on the nature of dispute.	It does have a special mechanism for execution of agreement (Art. 23 (par. 3) of Law No. 10/385 on Mediation in Dispute Resolution).
Macedonia	Criminal offences punishable by fine or imprisonment up to five (5) years.		60 days (According to Art. 20 (par. 2) of the Law on Mediation, the mediation procedure lasts 60 days, and according to Art. 493 of the Criminal Procedure Code of Macedonia, 2010, the mediation procedure lasts 45 days).	It does have a special mechanism for execution of agreement (According to Art. 496 (par. 1, subpar. 1.7 and 3-6) of Criminal Procedure Code of Macedonia, 2010, Defendant must fulfill the obligations foreseen to mediation agreement within 3 months).
Serbia	Criminal offences which are prosecuted by private lawsuit. (Art. 505 (par. 1) of the Criminal Code of Serbia, 2011)		60 days (Art. 24 (par. 4) of the Law on Mediation and Resolution of Disputes, 2014)	It does not have a special mechanism for execution of agreement.

Portugal	Criminal offences against life and body and property, prosecuted by private lawsuit and punishable by imprisonment up to 5 years (Art. 2 o Lei no. 21/2007 o Mediação em Processo Penal)		90 days, with possibility of extension for another 60 days (Art. 5 o Lei no. 21/2007 o Mediação em Processo Penal)	It does not have a special mechanism for execution of agreement.
Turkey	Criminal offences listed expressly. Punishment ranges from three (3) months to three (3) years. (Art. 253-255 of the Turkish Code of Criminal Procedure (TCCP).	Criminal offences against sexual integrity (Art. 252 (par. 3) of TCCP)	30 days as a rule, with possibility of extension for 20 days (Art. 252 (par. 12) of TCCP)	It does have a special mechanism for execution of agreement (Art. 252 (par. 19) of TCCP)

From the data presented it is evident that Albania may refer to mediation those criminal offences that are prosecuted upon the proposal of the injured party. These criminal offences should be punishable by between 6 months and 5 years imprisonment. The law does not provide any legal deadline for the duration of the mediation procedure, which is considered a shortcoming that should be resolved in the context of law review. This is because, as with any other legal procedure, the mediation should have an optimal deadline, as foreseen by most countries including Kosovo. A feature that distinguishes mediation in Albania from that in Kosovo is the fact that in Kosovo the maximum sentence for a criminal offence that may be referred to mediation is 3 years, while in Albania it is 5 years. In addition, Albania has provided by law a special mechanism for the execution of the agreement, the “Enforcement Service,” which executes the mediation agreement in addition to the criminal decisions rendered by the court.

Macedonia may refer to mediation criminal offences punishable by imprisonment of up to 5 years, and only to juvenile offenders. The duration of the procedure is 60 days. The law provides that the court will follow *ex-officio* execution of the agreement reached by the parties. The idiosyncrasy of the mediation system in Macedonia lies in the fact that it applies only to the field of juvenile justice, thus excluding adults. Additionally, the duration of the procedure is 60 days, which differs from Kosovo since for juveniles in our country this term is 30 days, while for adults it is 90 days.

Serbia may refer to mediation those criminal offences which are prosecuted by private lawsuits. These criminal offences include a small number of offences that pose lower social risk. The duration of the procedure is 60 days, as in Macedonia. What is worth emphasizing about mediation in Serbia is the fact that the law does not provide any specific mechanism for executing the agreement, which is a feature it has in common with Kosovo.

Portugal may refer to mediation criminal offences against life and body and property, which are prosecuted by private laws and punishable by imprisonment of up to 5 years. The duration of the procedure is 90 days, with the possibility of an extension for another 60 days. This country does not have any specific mechanism for executing the agreement. Common between the mediation systems in Portugal and Kosovo is the duration of the procedure being 90 days, however Portugal has provided for the possibility of an additional term of 60 days, while Kosovo allows for the possibility of an additional term of 30 days after the initial 90 day period. The distinguishing feature of the Portuguese mediation system is the fact that criminal offences for which mediation is permitted

include those against life and body as well as property and those punishable by up to 5 years of imprisonment. This sentence is the same as in Macedonia. A shortcoming of the mediation system in Portugal is the failure to anticipate the relevant mechanism for executing the mediation agreement.

Turkey may refer to mediation those criminal offences expressly listed in the Criminal Procedure Code, for which the sentence ranges from 3 months to 3 years. The duration of the procedure is 30 days, with the possibility of an extension for another 20 days. Turkey has foreseen a special mechanism for executing the mediation agreement. Criminal offences against sexual integrity have been excluded from the remit of mediation. The fact that offences for which mediation is allowed are *expressis verbis* is a feature of the mediation system in Turkey. The sentence of up to 3 years is the same as in Kosovo. Turkey has also excluded from mediation criminal offences against sexual integrity, while Kosovo has excluded from mediation criminal offences involving domestic violence.

## Conclusions

The modest results of this scientific paper have led to the following conclusions:

1. Mediation as an alternative procedure in the criminal justice field in Kosovo is distinguished by some distinctive characteristics compared to regular criminal proceedings, but also when compared to solutions foreseen from other countries in the region. These features are expressed in the criminal offences for which mediation is permitted, the deadlines for conducting procedure, and mechanisms for the implementation of an agreement, amongst other things.
2. A distinctive feature of mediation in the criminal field in Kosovo is that the beginning of mediation is found in Albanian customary law. Therefore, positive law has adapted traditional mediation by making it an integral part of the justice system.
3. The main feature of mediation in the criminal field is the definition of its scope by law in criminal matters. According to legal regulation in force, mediation is only possible for criminal offences punishable by fine and imprisonment of up to 3 years. Currently this criterion is considered to be optimal and is in line with the practice of most other countries, but there are some countries such as Portugal, Turkey, and Macedonia that have provided a solution to refer criminal offences to mediation that are punishable by imprisonment of up to 5 years. The possibility of expanding this criterion in Kosovo may be possible in the future, when our country establishes a good practice of implementing mediation and strengthening the justice system.
4. The referral of criminal case to mediation is an option and not an obligation for the state prosecutor, as well as for the relevant judge. When it comes to referring the criminal case to mediation, the state prosecutor or judge must assess the suitability of case for mediation. In this assessment, factors should be taken into consideration that include the circumstances related to the perpetrator (personality, past, guilt, behaviors before and after commission of a criminal offence), and the nature of the criminal offence (whether it has been committed by intent or negligence, etc.). In order to increase the efficiency of the criminal justice in Kosovo, it is encouraged to provide by law the obligation for any case where the legal conditions are fulfilled to first be referred by the prosecutor or judge to mediation, and if this initiative fails then to proceed to court.
5. Another feature of mediation in the criminal field in Kosovo is the fact that domestic violence criminal offences do not refer to mediation, even when dealing with criminal offences of a light nature. This prohibition is made after the assessment that the perpetrator and the injured party of the same family are in unequal positions, which is contrary to the fundamental principle of equality of the parties in mediation. As a likely further cause for this prohibition is the fact that in Kosovo there are high profile cases of murder of women by their spouses, so in these cases the only alternative is their proceeding through the court. Despite this principle prohibition, there are in practice mild cases of domestic violence, including intimidation, assault and light bodily

injury, which could exceptionally be resolved through mediation, especially when the perpetrator commits a criminal offence for the first time. This possibility should be incorporated in the context of legal changes, such as the opportunity to preserve family relationships by saving the parties from being exposed to criminal proceedings.

6. In practice mediation has been shown to be an effective means of criminal case resolution, where although the law provides that the deadline for completing the mediation procedure is 90 days, the analysis of 300 criminal cases studied demonstrated that in 280 cases the parties reached agreement within a single session, in 13 cases in two sessions, and in only 7 cases did the parties have to attend three sessions to reach an agreement. Compared to the duration of criminal proceedings (including initial, second, and the main trial) it transpires that mediation is an efficient mechanism for resolving a criminal case by significantly saving time and costs.

7. Another feature of mediation is the superficial level of criminal case resolution by mediation. Concerning this feature, the evidence suggested that out of 300 criminal cases studied that were completed by mediation, there were only 56 cases where the parties actually agreed to include compensation for the damage caused by criminal offence. The reasons for this finding are numerous and different, but this can be justified by the lack of institutional mediation tradition in Kosovo, as it is a relatively new institution and thus its effective implementation requires both time and the parties' awareness of this aspect of mediation.

8. Another feature of mediation in the criminal field is the lack of mechanisms guaranteeing the implementation of agreement reached between the parties. By law, there is no mechanism stipulating supervision of the implementation of an agreement. By way of a solution, our lawmaker has left the implementation of agreement to the parties, as mediation itself is a procedure based on the free will of the parties. As part of the changes that should be made to the Law on Mediation, Kosovo can implement the solution Albania has adopted in making the bailiff service responsible for implementing the agreement.

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